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No. 92-1384

Supreme Court, S.C.

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**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993**

BARCLAYS BANK PLC,

Petitioner,

v.

**FRANCHISE TAX BOARD, an Agency
of the State of California,**

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

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Date: December 16, 1993

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QUESTION PRESENTED

Amici will address the following question:

Whether California's application of worldwide combined reporting to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is unconstitutional under the Foreign Commerce Clause.

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On Writ of Certiorari to the
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BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION AS
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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting economic liberty, free enterprise principles, and a limited and accountable government. To that end, WLF has appeared before this Court as well as other state and federal courts in cases that involved impermissible attempts to usurp the role of the federal government in the conduct of foreign affairs or where

foreign affairs considerations were involved in the resolution of the case. See, e.g., *Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991); *Perpich v. U.S. Dep't of Defense*, 110 S. Ct. 2418 (1990). In particular, WLF has appeared before this Court in cases in which the conduct of one or more States threatens the free flow of foreign commerce. See, e.g., *Kraft General Foods, Inc. v. Iowa Dep't of Revenue and Finance*, 112 S. Ct. 2365 (1992).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the federal courts on a number of occasions.

WLF and AEF believe that the economic well-being of this country depends on the unrestricted flow of commerce, both interstate and across our nation's borders. They are extremely concerned that the income apportionment method employed by the State of California for purposes of income tax assessment will lead foreign countries to adopt retaliatory tax measures that will inevitably restrict the flow of foreign commerce.

Amici submit this brief in support of Petitioner with the written consent of both parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement of the Case set forth in Petitioner's brief.

In brief, this case involves the 1977 California income tax liability of two corporate affiliates of the Barclays Group, a United Kingdom banking group of over 220 corporations doing business in some 60 nations. The two affiliates, Barclays Bank International Limited (now

Barclays Bank PLC) and Barclays Bank of California, were the only two corporations within the banking group that conducted business in California.¹

Petitioner seeks a refund of taxes paid as a result of assessments (totalling in excess of \$150,000) levied by Respondent Franchise Tax Board (the "Board"). The Board computed its assessment based on application of California's "worldwide combined reporting" ("WWCR") method of income allocation. That method entails computing the *worldwide* income of any multinational corporate group found to comprise a "unitary enterprise" and then apportioning a portion of that income to California based on a formula that purports to take into account the percentage of the enterprise's activities with a California situs.

The effect of the WWCR method is that Petitioner must pay a California income tax based on profits earned by all 220 corporations within the Barclays Group -- even though only two of those corporations conducted any business (and earned any profits) in California in 1977. The WWCR method differs from the tax-assessment method employed by the United States government and every other country in the world. They employ the "arm's length method," which treats each corporation as "an independent entity dealing at arm's length with its affiliated corporations, and subject to taxation only by the jurisdictions in which it operates and only for the income it realizes on its own books." *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 185 (1983).

Claiming that the correct method upon which to compute its income tax was the arm's length method, Petitioner filed suit in California Superior Court for a tax

¹ Only one other corporation in the banking group did any business in the United States, and it conducted none of its business in California.

refund. Petitioner claimed that California's use of the WWCR method violated the Foreign Commerce Clause and the Due Process Clause of the U.S. Constitution, at least when applied to taxpayers that are members of a foreign-owned and controlled unitary group.

Both the Superior Court and the California Court of Appeal found that the Board's application of the WWCR method to foreign-owned unitary groups violated the Foreign Commerce Clause because it "impair[ed] federal uniformity in an area where federal uniformity is essential" and "prevent[ed] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 451 (1979). See Petition Appendix ("P.A.") A and B. The California Supreme Court reversed, finding no Foreign Commerce Clause violation based on the "one voice" rationale. P.A. C-38. It remanded the case to the Court of Appeal to decide two issues not previously decided: whether California's use of the WWCR method violated the Foreign Commerce Clause because it discriminated against foreign corporations, and whether it violated the Due Process Clause. P.A. C-39. The Court of Appeal ruled against Petitioner on both of those issues (P.A. "D"), and the California Supreme Court declined further review.

This Court granted a petition for writ of certiorari on November 1, 1993. Among the questions presented by the petition, *amici* address only the first: whether California's use of the WWCR method to determine the taxable income of domestic corporations with foreign parents, or foreign corporations with either foreign parents or foreign subsidiaries, is unconstitutional under the Foreign Commerce Clause.

SUMMARY OF ARGUMENT

In order to avoid having to undertake a dormant Foreign Commerce Clause analysis in this case, the California Supreme Court discerned a "clear federal

directive" that states should be permitted to employ the WWCR method in determining the tax liability of multinational corporate groups. That finding is not supported by any of the evidence adduced by the California court; indeed, the same evidence was also available to this Court when it decided *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), and this Court did not deem that evidence sufficient to establish any clear federal directive. The California Supreme Court's reliance on *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1 (1986) is misplaced; that case did not in any way alter the Court's basic approach to dormant Foreign Commerce Clause jurisprudence. The California court's refusal to consider the position of the executive branch when seeking to determine the existence of a "clear federal directive" was also error.

California's use of the WWCR method clearly violates the dormant Foreign Commerce Clause, because it prevents the federal government from speaking with one voice in international trade. The threat to the free flow of foreign commerce is readily apparent: numerous foreign governments have made clear that they are offended by the California tax system, one foreign government has already adopted retaliatory legislation, and more such legislation can be expected unless the Court reverses the decision of the California Supreme Court.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS NOT AFFIRMATIVELY DECIDED TO PERMIT WWCR

A. Controlling Legal Principles

Article I, § 8, cl. 3 of the U.S. Constitution reserves to Congress the power to regulate commerce with foreign nations and among the States. This Clause, "by its own force created an area of trade free from interference by the

States" and "even without implementing legislation by Congress is a limitation upon the power of the States." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). That portion of Commerce Clause jurisprudence involving limitation on State powers even in the absence of Congressional action is generally referred to as the "dormant" Commerce Clause.

The test for determining whether state taxing schemes violate the Commerce Clause is well established. A state taxing scheme is considered fair -- and thus does not impermissibly burden interstate commerce -- if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). When the state tax involves foreign commerce and is challenged under the dormant Foreign Commerce Clause, two additional questions must be addressed to determine the constitutionality of the tax:

[F]irst, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Japan Line, 441 U.S. at 451.

Amici submit that the Board's use of the WWCR method violates the second of the two *Japan Line* tests: it prevents the federal government from speaking with one voice when regulating commercial relations with foreign governments. Because this Foreign Commerce Clause violation is so clear, *amici* believe it is unnecessary to reach any of the other arguments raised by Petitioner.

The Court expanded upon the meaning of the "one voice" test in *Container Corp.*² Where a state tax is at variance with federal policy, it violates the "one voice" standard if it "implicates foreign policy issues" -- such as creating a threat of "offending our foreign trading partners and leading them to retaliate against the nation as a whole." *Container Corp.*, 463 U.S. at 194. But if a state tax does not implicate foreign affairs but rather merely "has foreign resonances," then it violates the Foreign Commerce Clause only if it "violates a clear federal directive." *Id.* The Court recognized that cases decided under the "clear federal directive" standard were "essentially a species of pre-emption analysis." *Id.*

B. Federal Approval of Commerce Clause Violations Is Not To Be Inferred in Absence of Unambiguous Declaration

In upholding the Board's application of the WWCR method to foreign-controlled corporate groups, the California Supreme Court seized upon the "clear federal directive" language to avoid altogether a dormant Foreign Commerce Clause analysis. The California Supreme Court stated that whenever there is a "clear federal directive" that a state tax scheme is either permissible or

² In *Container Corp.*, the Court upheld the Board's use of the WWCR method with respect to domestic-controlled corporate groups. However, it explicitly left open the question raised in this case: "the constitutionality of [WWCR] apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries." *Container Corp.*, 463 U.S. at 189 n.26. The Court added,

We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis.

Id. at 195 n.32.

impermissible, that directive controls and no dormant Foreign Commerce Clause analysis is necessary. P.A. C-25, 26. Relying on this Court's decision in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986), the California court went on to discern a Congressional intent that States should be free to employ the WWCR method in computing corporate income tax liability, even when dealing with foreign-controlled corporate groups. P.A. C-28 to C-37. Accordingly, the court found no Foreign Commerce Clause violation. P.A. C-38.

The California Supreme Court was undoubtedly correct in declaring that the ultimate decision regarding whether a state taxing scheme violates the Foreign Commerce Clause rests with Congress. No matter how discriminatory a state taxing scheme may be and no matter how serious may be its foreign policy implications, the scheme does not violate the Commerce Clause if Congress declares that no violation exists. If it so chooses, Congress is free to invite foreign retaliation by sanctioning state taxing scheme that other countries find highly objectionable.

But such action by Congress is sufficiently unusual that this Court has been highly reluctant to infer such Congressional intent. A federal statute will not be read as approving state conduct that (in the absence of congressional approval) would constitute a dormant Commerce Clause violation unless Congress has "manifest[ed] its *unambiguous* intent" to so approve. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992). Congress has manifested no such intent in this case. The California court's reliance on *Wardair* in support of its finding of such a congressional intent is misplaced.

C. *Wardair* Inferred Congressional Approval Based on Congressional Action, Not Inaction

In order to fully comprehend why the California Supreme Court's heavy reliance on *Wardair* was misplaced, a detailed review of that decision is warranted.

In that case, Florida's sales taxation of all fuel purchased in Florida was challenged by a Canadian airline insofar as it authorized assessment of a tax on fuel used by foreign airlines engaged exclusively in foreign commerce. The airline argued that Congress had intended to preclude state taxation of foreign airline fuel when it adopted the Federal Aviation Act; and that (for purposes of dormant Foreign Commerce Clause analysis) the United States had manifested its "policy of tax exemption for the instrumentalities of international air traffic" by: (1) becoming a party to the Chicago Convention on International Civil Aviation (a 1944 international convention signed by 157 nations that created an "international aspiration" to "eliminate all impediments to foreign air travel"); (2) its membership in the International Civil Aviation Organization (ICAO), which adopted a 1966 resolution calling for foreign airlines to be exempt from all State sales taxation; and (3) its entry into more than 70 bilateral agreements dealing with international aviation, in which the United States committed itself not to impose a national tax on aviation fuel. *Wardair*, 477 U.S. at 9-11.

The Court rejected the airline's claim that Florida's tax flunked *Japan Line's* "one voice" test. The Court held that the dormant Foreign Commerce Clause was not even implicated by the case because, it said, Congress had used its "voice" to speak up affirmatively in favor of the right of states to tax fuel sales to foreign airlines. *Id.* at 9-12. The Court said:

Foreign Commerce Clause analysis requires that a court ask whether a state tax "prevents the Federal Government from 'speaking with one

voice when regulating commercial relations with foreign governments.'" But we never suggested in [*Japan Line*] or any other [case] that the Foreign Commerce Clause *insists* that the Federal Government speak with any particular voice.

Wardair, 477 U.S. at 13 (quoting *Japan Line*, 441 U.S. at 451).

In discerning federal approval of the Florida's right to impose its sales tax on foreign airlines, the Court looked to the following evidence: (1) § 1113 of the Federal Aviation Act, 49 U.S.C. § 1513, directly addressed the issue of "State taxation of air commerce" and included "sales or use taxes on the sale of goods or services" among those taxes that were permissible; (2) Article 24(a) of the Chicago Convention, 61 Stat. 1180, by its terms precluded the imposition of local taxes on fuel only when the fuel is "on board an aircraft . . . on arrival . . . and retained on board on leaving" and did not preclude local taxation of fuel purchased in that locality; (3) the federal government, although a member of the ICAO, never signed or even endorsed the ICAO resolution, and thus the resolution's condemnation of local fuel taxes could not be deemed U.S. policy; (4) *after* the Chicago Convention came into force, the United States became a party to more than 70 bilateral aviation agreements, and while the agreements explicitly committed the U.S. to refrain from imposing national taxes on aviation fuel, in none did the U.S. agree to bar the States from imposing such taxes; (5) the U.S.-Canadian Agreement, signed eight years after the ICAO resolution was adopted and thus at a time when negotiators would have been aware of the resolution's disapproval of local sales taxes on fuel, limited the tax exemption to be afforded to foreign air carriers to "national duties and charges"; and (6) throughout the time that the U.S.-Canadian agreement had been in effect, some American States and some Canadian Provinces had imposed local sales taxes on aviation fuel purchased by the other country's airlines. *Id.* at 6-7, 9-12.

Wardair can thus be seen as a generally unremarkable effort by the Court to discern congressional intent based on an analysis of congressional *action*. The evidence relied on by the Court included *affirmative* adoption of the Federal Aviation Act, *affirmative* adoption of the Chicago Convention, and *affirmative* adoption of the 70 bilateral aviation agreements. The Federal Aviation Act *explicitly permitted* state sales taxation of fuel purchases; even standing alone, that piece of evidence would probably have been sufficient to demonstrate congressional intent. With regard to the Chicago Convention and the bilateral aviation agreements, the Court quite reasonably concluded that since (during the course of taking these affirmative steps) the federal government could reasonably have been expected to have said so if it did not intend to permit state taxation, its failure to say so is an indication that it did intend to permit state taxation.

Accordingly, the California Supreme Court's reliance on *Wardair* to discern congressional approval of California's application of the WWCR method to foreign-controlled corporate groups is untenable. The evidence cited by the California court in support of its finding of congressional approval of WWCR is not even remotely similar to the evidence present in *Wardair*. The evidence cited by the California court consists solely of congressional *inaction*. There is a world of difference between *Wardair's* suggestion that the "negative implications" of affirmative congressional action are relevant to a determination that Congress consented to a state law (*Wardair*, 477 U.S. at 10, 12) and the California Supreme Court's assertion that congressional consent can be inferred from the "negative implications" of congressional *inaction*.

Indeed, this Court has repeatedly warned against drawing any inferences from Congress's failure to act. *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988); *American Trucking Assns., Inc. v. Atchison, T. & S.F.R. Co.*, 387 U.S. 397, 416-418 (1967).

Yet, the California court's conclusions were based largely on such inferences. The items of inaction relied on by the California court were:

- (1) Failure of the Senate to adopt by 2/3 vote a U.S.-U.K. tax treaty that included a provision barring State use of the WWCR method (P.A. C-27);
- (2) Failure to include bans on state use of the WWCR method in various bilateral tax treaties (*id.*);
- (3) The absence of restrictions on state taxation in "Friendship, Commerce and Navigation" treaties to which the U.S. was a party (*id.*); and
- (4) Abandonment of executive branch efforts to obtain restrictions on state taxation through bilateral treaties, following rejection of the U.S.-U.K. tax treaty (*id.* at C-28);
- (5) The failure of Congress to adopt legislation restricting state use of the WWCR method (*id.* at C-30 to C-31).

The first and fifth item relied on by the California Supreme Court (failure of Congress to adopt legislation and the U.S.-U.K. Treaty) are the most clearly flawed; as noted above, congressional inaction is simply not a guide to congressional intent. That is particularly true in the case of the U.S.-U.K. tax treaty, which actually commanded majority support in the Senate. Moreover, among the minority of Senators who opposed the treaty, there is no way of knowing whether they did so because they wanted to permit States to use the WWCR method; it is equally plausible that they simply opposed effecting a restriction on state taxing powers by means of a treaty ratification rather than by means of direct legislation.

The second and third items, while bearing superficial resemblance to items considered by the Court in *Wardair*, are of little evidentiary value. The treaties in question are

totally silent regarding proper reporting requirements at the subnational level. This contrasts sharply with the evidence in *Wardair*, where (for example) the Chicago Convention directly addressed the imposition of local sales taxes and banned such imposition only when the fuel is "on board an aircraft . . . on arrival . . . and retained on board on leaving." *Wardair*, 477 U.S. at 10. Moreover, as the California Court of Appeal noted, most of these treaties were adopted prior to WWCR's use becoming widespread -- and thus it is highly likely that the negotiators gave little thought to addressing state taxation issues. This contrast sharply with the situation in *Wardair*, where virtually all negotiations took place against the backdrop of the Chicago Convention's explicit acquiescence to imposition of state sales tax on all fuel purchases in the state.

The evidence of executive branch abandonment of efforts to adopt treaties containing bans on state use of the WWCR method actually cuts against the California court's position. As the California Supreme Court acknowledges, the executive branch has had a decades-long policy of asserting that state use of the WWCR method violates the dormant Foreign Commerce Clause. The executive branch's alleged abandonment of treaty efforts is fully consistent with its belief that such treaties are unnecessary (because use of the WWCR method is prohibited by the Foreign Commerce Clause). It is hardly evidence that the executive branch has acquiesced to state use of the WWCR method.³

³ The California Supreme Court's reliance on this executive branch evidence is particularly ironic, in light of its refusal to consider the longstanding executive branch opposition to WWCR in determining whether there was a "clear federal directive." See P.A. C-37 n.22 ("Although we accept the Justice Department's argument that the views of the executive branch on the international effect of state taxation practices are entitled to 'great weight' under a foreign dormant commerce clause analysis (cf. *Container*, *supra*, 463 U.S. at p. 196), our conclusion that such an analysis is not triggered here forecloses resort to those views."). That refusal was clear improper. While the overriding consideration in determining whether the federal government

(continued...)

Finally, there is simply no support for the California Supreme Court's assertion that *Wardair* represents a departure from prior Supreme Court analysis of dormant Foreign Commerce Clause issues. Certainly, *Wardair* itself makes no such claim. Subsequent decisions from this Court have discussed dormant Foreign Commerce Clause issues without giving any indication that *Wardair* marked a departure from prior case law. See, e.g., *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 112 S Ct. 2365 (1992). In the absence of such a departure, the findings of *Container Corp.* are still good law -- and those findings including a finding that the federal government had not provided a clear directive one way or the other regarding the propriety of state adoption of the WWCR method. The California Supreme Court's subsequent determination that Congress has directed that states should be free to adopt WWCR is untenable, given that the evidence relied on by the California court in arriving at that determination was also available to this Court in the *Container Corp.* case.

In sum, the California Supreme Court erred in determining that Congress has provided a "clear directive" that States should be permitted to adopt the WWCR

³ (...continued)

has provided a "clear directive" on a Commerce Clause issue is whether Congress has acted, the role of the executive branch is far from irrelevant in ascertaining that directive. Congressional silence in the face of executive branch assertion that state taxation is unconstitutional is certainly of some significance. If the views of the executive branch were irrelevant, *Container Corp.* most likely would have used the term "clear congressional directive" rather than the term "clear federal directive." *Container Corp.*, 463 U.S. at 194. Moreover, the Court in *Wardair* found it significant, in finding federal acquiescence in state sales taxation of aviation fuel, that the executive branch had neither endorsed nor signed the ICAO Resolution which condemned such taxation. *Wardair*, 477 U.S. at 11. If executive branch action were irrelevant in ascertaining a "clear federal directive," the Court would not have deemed the executive branch's conduct worthy of mention.

method. Certainly, nothing in *Wardair* supports that decision.

II. RESPONDENT'S TAXATION SYSTEM PREVENTS THE FEDERAL GOVERNMENT FROM SPEAKING WITH ONE VOICE IN INTERNATIONAL TRADE

In the absence of clear directive from Congress on the issue, the appropriate course is to resort to traditional dormant Foreign Commerce Clause analysis in determining the propriety of the Board's use of WWCR.

Under *Container Corp.*, the only relevant questions are: (1) whether the California system is "at variance with federal policy"; and (2) whether the California system implicates foreign policy issues which must be left to the federal government. *Container Corp.*, 463 U.S. at 194. Both questions can only be answered "yes."

First, we do not understand even the Board to contest that California's use of the WWCR method is at variance with federal policy. The United States and every national government in the world employs the "arm's length" method. In its *amicus* brief filed in this case with the California Supreme Court, the United States said:

It is the expressed policy of the United States that the separate accounting or "arm's length" method is the appropriate method of allocating income among commonly controlled multinational corporations. . . . This view has been adopted in the United States Internal Revenue Code (26 U.S.C., Section 482), and is embodied in virtually all bilateral tax treaties that have been entered into by the United States. . . . The "arm's length" is the international norm. . . . Application by states of the worldwide combined unitary method of taxation conflicts directly with this federal policy and international standard.

P.A. H-10 to H-12.⁴

The serious foreign policy implications of continued state use of the WWCR method are self-evident. The Court recognized in *Container Corp.* that "[t]he most obvious foreign policy implication of a state tax is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole." *Container Corp.*, 463 U.S. at 194. The briefs filed to date in this case by numerous foreign countries is ample evidence that our foreign trading partners are deeply offended by California's continued use of the WWCR method.⁵

⁴ *Amici* do not know what position the current administration will take in the *amicus* brief it files in this case. *Amici* do know, however, that California's use of WWCR conflicts with a strong federal policy that has existed for the past two decades and that undeniably was in place during the tax year in dispute in this case -- 1977. Moreover, as this Court made clear in *Container Corp.*, the position taken by the United States in an *amicus* brief "is by no means dispositive." *Container Corp.* 463 U.S. at 195-196. Indeed, the Court in *Wardair* found that the federal government had affirmatively sanctioned state sales taxation of aviation fuel, despite claims to the contrary contained in an *amicus* brief by the United States.

⁵ Whether our trading partners are justified in taking offense is largely beside the point -- since the mere existence of that offense is sufficient to disrupt foreign commerce, a result that is ultimately to no one's advantage. In any event, *amici* believe that foreign governments are fully justified in taking offense. First, as *Container Corp.* recognized, the WWCR method inevitably leads to double taxation. California is justifiably seen by foreign countries as attempting to secure more than its fair share of corporate profits: California is a jurisdiction where wage rates, property values, and sales prices are relatively high, almost ensuring that the WWCR method will redound to California's benefit. See *Container Corp.*, 463 U.S. at 202 (Powell, J., dissenting). Second, although every country in the world employs the arm's length method, California's insistence on using the WWCR method forces every major corporation in the world to keep books in conformity with California's demands. Third, while application of WWCR to domestic multinational corporations is not a major concern to most foreign countries, all foreign countries are understandably protective toward their own multinationals.

Moreover, retaliation has already begun. The United Kingdom has adopted retaliatory legislation which (although not currently being enforced) one can reasonably expect will be enforced unless the California Supreme Court's decision is reversed. The Court need not await guidance from the federal government to determine that such retaliation will harm the entire American economy.

In sum, California should not be permitted to retain a income taxation system that may benefit one state but that ultimately hurts the rest of the American economy as a result of retaliation by those who are inevitably angered by the WWCR system.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the judgment below be reversed.

Respectfully submitted,

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